

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

BILLY G. MARSHALL,)	
)	
Plaintiff,)	
vs.)	NO. CIV-11-0575-HE
)	
CARL BEAR, et al.,)	
)	
Defendant.)	

ORDER

Plaintiff, a prisoner appearing *pro se* and *in forma pauperis*, filed this § 1983 action against three state correctional officials for alleged deprivations of his constitutional rights. Consistent with 28 U.S.C. § 636(b)(1)(B) and (C), the matter was referred to Magistrate Judge Bana Roberts, who has recommended that a motion for summary judgment filed by defendants be granted.¹ Plaintiff has objected to the Report and Recommendation.

The magistrate judge determined and the court agrees, having conducted a *de novo* review,² that plaintiff failed to exhaust his administrative remedies with respect to the claims asserted in his complaint. In his objection, plaintiff does not claim he exhausted his grievances. Instead, he challenges the grievance restriction that was placed on him. He asserts that it was based upon the personal opinion of a staff member and imposed without due process. As plaintiff did not raise that issue in his complaint or sufficiently present it to

¹The motion was a combined motion to dismiss and motion for summary judgment. Because she considered materials outside the pleadings, the magistrate judge treated the motion as one filed under Fed.R.Civ.P. 56.


²The court's analysis of the background and circumstances of this case has been made substantially more difficult by the extremely poor quality of the Martinez report submitted by the Department of Corrections. Substantial portions of the report are borderline incoherent.

the magistrate judge,³ the court will not address it now. United States v. Garfinkle, 261 F.3d 1030, 1031 (10th Cir. 2001) (“In this circuit, theories raised for the first time in objections to the magistrate judge’s report are deemed waived.”).

Accordingly, the court adopts Magistrate Judge Robert’s Report and Recommendation and **GRANTS** defendants’ motion for summary judgment [Doc. #28]. The action will be dismissed without prejudice for failure to exhaust administrative remedies.

IT IS SO ORDERED.

Dated this 27th day of September, 2012.



JOE HEATON
UNITED STATES DISTRICT JUDGE

³As she noted in her Report and Recommendation, plaintiff “assert[ed] without further explanation that Defendants ‘used an unconstitutional grievance appeal restriction to prohibit plaintiff’s right of appellate review.’” Report and Recommendation, p. 8 (quoting Plaintiff’s Response, p. 3.).